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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JEVARY WHITMAN and
KAPREE MAURICE BROWN,

Defendants and Appellants.

B213052

(Los Angeles County
Super. Ct. No. MA041538)

APPEAL from judgments of the Superior Court of Los Angeles County,
John Murphy, Judge. Affirmed as Modified.

Linn Davis, under appointment by the Court of Appeal, for Defendant and
Appellant Jevary Whitman.

James R. Bostwick, Jr., under appointment by the Court of Appeal, for
Defendant and Appellant Kapree Maurice Brown.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Scott A.
Taryle and Stephanie A. Miyoshi, Deputy Attorneys General, for Plaintiff and
Respondent.

A jury convicted defendants Jevary Whitman and Kapree Maurice Brown of assault by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1))¹ and found true the allegation that they personally inflicted great bodily injury in the commission of the crime (§ 12022.7, subd. (a)). As to defendant Whitman alone, the jury found true the allegation that he committed the crime for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)). The jury also convicted defendant Whitman alone of second degree robbery (§ 211) and kidnapping (§ 207, subd. (a)), and found gang allegations in those counts to be true.

In a bifurcated, non-jury trial, the trial court found that defendant Whitman had previously been convicted of robbery (§ 211), alleged as a prior strike under the Three Strikes law (§§ 1170.12, subds. (a)-(d); 667, subds. (b)-(i)), as a prior serious felony (§ 667, subd. (a)(1)), and as the conviction underlying a prior separate prison term (§ 667.5, subd. (b).) The court sentenced him to a term of 44 years, 4 months in prison.

Defendant Brown admitted having served a prior separate prison term (§ 667.5, subd. (b)), and was sentenced to six years in state prison.

Both defendants appeal from their respective judgments of conviction. Defendant Brown contends that the great bodily injury enhancement must be set aside, because the evidence was insufficient to prove that he personally inflicted great bodily injury on the victim. We disagree, and affirm the judgment as to him. Defendant Whitman contends that the trial court erred in imposing two separate enhancements for his single prior serious felony conviction. We agree, modify the judgment accordingly, and also modify the judgment so as to strike (rather than

¹ All undesignated section references are to the Penal Code.

stay) the enhancement for his prior separate prison term. As so modified, we affirm the judgment as to defendant Whitman.

BACKGROUND

Prosecution Evidence

The victim of defendants' crimes was Melvin Chandler, an acquaintance of defendants Whitman and Brown.

On January 27, 2008, defendant Whitman, a Hoover Crips gang member called "Head Busta," invited Chandler to "come over and kick it." After Chandler retrieved some marijuana from his house, he and defendant Whitman went to an apartment across the street. Defendant Brown and another man, Joseph Williams, were already there. Defendant Brown belonged to a Crips-affiliated gang called the Original Valley Gangsters, and Williams belonged to the Hoover Crips.

The men smoked marijuana, and at some point Williams mentioned some missing guns. Chandler said that he did not know anything about them. Defendant Whitman then struck Chandler in the left eye. Chandler fell off his chair to the floor. Defendants and Williams kicked him in the head and face, struck him with chairs, and dragged him around the house. Williams and defendant Whitman declared, "Don't fuck with the Hoover Boys, cuz. We'll kill you." Chandler tried to run for the door, but was tackled and dragged back. Defendants and Williams kicked him in the head and face, and defendant Whitman threatened to kill him.

Williams threw Chandler on the couch. Defendant Whitman offered him water and a towel for his left eye, which was bleeding, and took various items from him (his cell phone, jacket, keys, shoes, wallet, and identification). He called the identification a "trophy," and said he knew where Chandler's family lived. Defendant Brown took a silver chain from Chandler's neck and soon departed.

Two women – one known as “Lady Groove” and another woman Chandler did not know -- entered the house, and spoke of putting Chandler in the trunk of a car, driving him somewhere, and “finish[ing] the job off” and “pop[ping] him.” Defendant Whitman, Williams, and the two women took Chandler to the car. Chandler was placed in the back seat between Williams and defendant Whitman, and the woman Chandler did not know drove to an alley. There, Lady Groove, Williams, and defendant Whitman got out of the car. Chandler got out and tried to run, but was tackled and kicked and beaten again. He held onto a gate post in the alley, and was able to escape by running to a nearby backyard and hiding in a trash can. His eye felt like it was “hanging out of [his] face” and was bleeding heavily. Ultimately, he walked to a friend’s house and was taken to the police station, and later to the hospital. His cheeks were bruised, his eyes were bloodshot, and his left eyelid was severely torn. He underwent surgery to repair the eyelid and received stitches to close the wound.

Asked a hypothetical question based on the foregoing evidence, the prosecution gang expert, Los Angeles County Sheriff’s Detective William Pickett, testified that the offenses against Chandler were committed for the benefit of the Hoover Crips.

In March 2008, when questioned by Los Angeles County Sheriff’s Detective Richard Cartmill, defendant Whitman said that he had been in a fight with Chandler over property left in a box near Chandler’s residence.

Defendant Whitman’s Evidence

Defendant Whitman testified that he kept a liquor box containing marijuana and a BB gun in the backyard of an abandoned house down the street from Chandler’s house. After the box had been missing for a couple of days, he

confronted Chandler at a park. Chandler refused to return the box, and the two fought. Defendant Whitman knocked Chandler down, and Chandler left the park. Defendant Whitman admitted having previously been convicted of grand theft and robbery, and denied being a gang member.

Defendant Brown's Evidence

Defendant Brown's fiancée, D'Starr Blackwell, testified that as a Sunday routine she and defendant Brown would take their two children on family outings, and that if they had not spent the Sunday of the crimes together, she would remember.

DISCUSSION

Great Bodily Injury Allegation

Defendant Brown contends that the evidence was insufficient to sustain the great bodily injury allegation against him on a group-beating theory. He asserts that the only significant injury Chandler suffered was his torn eyelid. According to defendant Brown, because defendant Whitman struck Chandler in that eye, the evidence proved that defendant Whitman alone inflicted that injury and defendant Brown had no role in it. We disagree.

A defendant who participates in a group attack may be found to have inflicted great bodily injury on the victim "if defendant personally applied physical force to the victim either (1) of a nature that, 'by itself,' could have caused great bodily injury, or (2) under such circumstances that the 'cumulative effect' of the force used by all participants would have caused the injury." (*People v. Modiri* (2006) 39 Cal.4th 481, 485 (*Modiri*).) "[T]he defendant's role in both the physical attack and the infliction of great bodily injury cannot be minor, trivial, or

insubstantial,” but rather must “contribute substantially to the victim’s injured state.” (*Id.* at p. 494.)

Here, viewing the evidence in the light most favorable to the judgment (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), substantial evidence supports the finding that defendant Brown inflicted great bodily injury on Chandler. Chandler testified that defendant Whitman struck him in the left eye, that he fell off his chair to the floor, and that both defendants (along with Williams) kicked him in the head and face, struck him with chairs, and dragged him around the house. Later, after Chandler was tackled when he tried to escape, both defendants (again along with Williams) kicked him in the head and face. Chandler described defendant Brown as having “beat[] the shit out of me” at the apartment. By the time this attack at the apartment ended, Chandler was bleeding heavily from his left eye, with blood on his “shirt, pants, [and] dripping from [his] eye.” Later, after being taken to the alley, Chandler was beaten and kicked again by Lady Groove, Williams, and defendant Whitman. After all these attacks, Chandler had, among other lesser injuries, a severely torn eyelid.

On this record, the jury could reasonably infer that the single blow first struck by Whitman did not alone cause the severely torn left eyelid. Rather, the jury could infer that whatever initial injury might have been inflicted by the first blow to the eye, it was substantially exacerbated by the repeated kicking about the head and face to which Chandler was subjected by both defendants and Williams at the apartment. Thus, the evidence was sufficient to prove that defendant Brown “personally applied physical force to the victim . . . under such circumstances that the ‘cumulative effect’ of the force used by all participants would have caused the injury.” (*Modiri, supra*, 39 Cal.4th at p. 485.)

Sentencing

In sentencing defendant Whitman, the trial court made count 3 (kidnapping) the principal term, and sentenced him to 16 years (the 8-year high term, doubled under the Three Strikes law), plus 10 years for the gang enhancement. On count 2 (assault with a deadly weapon), the court sentenced defendant Whitman to a consecutive term of 2 years (one-third the 3-year mid-term, doubled), and added 3 years for the great bodily enhancement and 3 years, 4 months for the gang enhancement (one-third the 10-year mid-term, doubled). Also on count 2, the court imposed 5 years for the prior serious felony (§ 667, subd. (a)(1)). Finally, on count 1 (second degree robbery), the court sentenced defendant to 5 years, and stayed that term under section 654. However, the court also imposed on that count a second 5-year enhancement for the prior serious felony, resulting in a total prison term of 44 years, 4 months.

Defendant Whitman contends that the trial court erred in imposing two separate 5-year terms for the prior serious felony conviction. Respondent concedes the point, and we agree. In determinate sentencing, enhancements for prior convictions are imposed only once, and not as to a particular count, but as a separate term to complete the aggregate sentence. (See *People v. Tassell* (1984) 36 Cal.3d 77, 90, overruled on another point in *People v. Ewoldt* (1994) 7 Cal.4th 380, 401; see also § 1170.1, subd. (a) [“the aggregate term of imprisonment for [multiple] convictions shall be the sum of the principal term, the subordinate term, *and any additional term imposed for applicable enhancements for prior convictions*, prior prison terms, and Section 12022.1” (italics added)].) Thus, the trial court erred in imposing two separate 5-year terms for the single prior felony conviction. We order one stricken, resulting in a reduction of defendant Whitman’s total sentence to 39 years, 4 months. Moreover, the remaining 5-year

term must be imposed as a separate term as part of the aggregate term of imprisonment; it cannot be imposed on a particular count. We order the judgment modified accordingly.

Finally, we also note that the court purported to stay a one-year prior prison term enhancement (§ 667.5, subd. (b)) on both counts 1 and 2. As with the prior serious felony enhancement, a prior prison term enhancement may be imposed only once to set the aggregate term. Also, it either must be imposed or stricken; it cannot be stayed. (See *People v. White Eagle* (1996) 48 Cal.App.4th 1511, 1521.) Thus we order the judgment modified to strike the section 667.5, subdivision (b) enhancement. This does not affect defendant Whitman's total sentence.

DISPOSITION

The judgment as to defendant Brown is affirmed. The judgment as to defendant Whitman is modified so as to impose a single 5-year enhancement for the prior serious felony conviction (§ 667, subd. (a)) as part of the total aggregate sentence, and to strike the prior prison term enhancement (§ 667.5, subd. (b)), resulting in an aggregate sentence of 39 years, 4 months. The clerk of the superior court is ordered to send an amended abstract of judgment reflecting these changes to the Department of Corrections and Rehabilitation. As so modified, the judgment as to defendant Whitman is affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.